MOHD ADLI MAARIS & ANOR

v.

HONG LEONG FINANCE BHD

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL SUIT NO: 12-49-2003]
22 AUGUST 2005

CIVIL PROCEDURE: *Default judgment - Setting aside - Appeal - Inordinate delay - Service by AR registered post - Subordinate Courts Rules 1980, O. 29 r. 14 & O. 7 r. 1(1)*

The first defendant entered into a hire-purchase agreement dated 14 May 1997 with the plaintiff ("said HP Agreement") for the hire purchase of a vehicle. The first defendant defaulted on his repayments under the said HP Agreement which culminated in the plaintiff filing an action for recovery of arrears under the said HP Agreement in the Sessions Court. The plaintiff sent the summons to the first defendant by A.R. Registered post ("AR") to the address of the first defendant as stated in the said HP Agreement and as stated in the first defendant's correspondences to the plaintiff, which said summons was returned by the postal authorities with the comment "unclaimed". The plaintiff, after numerous unsuccessful attempts to effect service of the summons, applied and obtained an order for substituted service of the summons which was duly effected. Judgment in default was entered against the first defendant on 29 September 1999 ("JID"). The first defendant applied to set aside the JID ("said Application") which said Application was dismissed on 1 October 2003 ("said Decision"). The first defendant is now appealing against the said Decision of the learned judge.

Issues:

a) Whether there was a delay on the part of the first defendant in filing in the said Application;

b) Whether service of the summons and statement of claim on the first defendant by AR is sufficient service of the pleadings on the first defendant; and

c) Whether the two return dates on the plaintiff's summons prejudiced the first defendant, thereby rendering the JID irregular qualifying it to be set aside *ex debito justitiae*.

Held (Dismissing the appellant's appeal with costs):

[1] The true position is that at all times before 1 July 2002, the first defendant had already received the judgment against him. Since the first defendant had occasioned an inordinate, unexplained delay of at least eight months, the court may refuse relief to him as an indolent litigant. (p. 401 d & f)

[2] The summons and statement of claim had been sent to the first defendant by AR to the first defendant's address as stated in the said HP Agreement as well as through his correspondences to the plaintiff, which said pleadings were returned with the remarks "unclaimed". Having perused the relevant clauses in the said HP Agreement, there can be no doubt that service of the summons by way of AR addressed to the first defendant was sufficient. (p. 402 c-d)

[3] Having regard to the factual background, in particular the first defendant's negotiations with the plaintiff after the judgment, I am unable to sustain the submission that the first defendant had been prejudiced in relation to the return dates. (p. 403 d)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***
Malayan Banking Bhd v. Mahmood Zuhdi Hj Mohd Nor [2001] 6 CLJ Supp 171 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Berhad [1989] 3 MLJ 155 SC ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(dist)***
Wilken Sdn Bhd v. Chua Beng Hock & Ors [2004] 2 CLJ 164 HC ***(refd)***

Legislation referred to:

Subordinate Courts Rules 1980, O. 7 r. 1(1), O. 29 r. 14

For the plaintiff - Mohd Aidil Rusli; M/s Soo Thien Ming & Nashrah
For the defendant - S Ravi Chandran; M/s Azmat Ravi & Assoc

Reported by Sharmini Pillai

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant ("the first defendant") against the decision of the learned sessions court judge ("the trial judge") who had on 1 October 2003 dismissed the first defendant's application dated 3 March 2003 to set aside the default judgment entered against him on 29 September 1999.

Factual Background

The first defendant had on 14 May 1997 entered into a hire-purchase agreement ("the agreement") with the plaintiff for the hire of a Proton Wira car bearing registration number NAM 4327.

Upon the first defendant's default in the payment of the instalments pursuant to the agreement, the plaintiff had filed an action in the sessions court against, *inter alia*, the first defendant on 12 September 1998. The first defendant's address was stated as No. 7, Taman Bukit Kelana 70400 Seremban. The plaintiff had sent the summons to the first defendant at this address by way of AR Registered post on 20 October 1998 but it was returned unclaimed. That address was given by the first defendant to the plaintiff and was expressly stated in the agreement. The same address was stated in the defendant's own letters dated 1 July 2002 to the plaintiff.

The original return date of the summons had to be postponed several times and the plaintiff's subsequent attempts to effect service of the same also proved unsuccessful. The plaintiff had on 5 February 1999 obtained an order for substituted service which was subsequently effected. The order for substituted service had stated that the return date of the summons was 29 September 1999, on which judgment in default was entered against the first defendant when he was absent.

The first defendant had thereafter telephoned the plaintiff's office and sent facsimile and letter dated 1 July 2002 to the plaintiff in order to satisfy the judgment sum pursuant to the judgment. The first defendant had not denied this in his affidavit. He also did not deny the outstanding arrears which he had to pay on the due dates pursuant to the agreement.

Delay In Filing Application

The plaintiff's learned counsel Mr Mohd Aidil bin Rusli raised the issue of the unexplained delay of three years and five months on the part of the first defendant in filing the application in the sessions court, relying on *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA; *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd.* [1997] 1 CLJ 396 CA; and *Malayan Banking Bhd v. Mahmood Zuhdi Hj Mohd Nor* [2001] 6 CLJ Supp 171 HC.

Mr. S. Ravi Chandran, first defendant's learned counsel, responded that there was no issue of delay as the first defendant had filed the application as soon as he had notice of the judgment when he was informed by the plaintiff of the bankruptcy proceedings against the first defendant.

From the appeal record, I find that the first defendant had on 1 July 2002 written twice to the plaintiff's solicitors referring to the telephone conversation between him and one Raja Nazleen bt Raja Khalid of the plaintiff's solicitors asking for consideration by the plaintiff's solicitors in relation to the repayment of the judgment sum in question, for which he agreed to repay by way of a down payment of RM5,000 and then RM500 monthly.

These letters have been annexed as exhibits to the plaintiff's affidavit to which the first defendant had failed to contradict. Where, as in this case, the plaintiff makes a positive assertion upon this material issue, the first defendant's failure to contradict it is usually treated as an admission by him of the fact so asserted: *Ng Hee Thoong & Anor, supra*, per Gopal Sri Ram JCA.

In my judgment, the true position is that at all time before 1 July 2002, the first defendant had already received the judgment against him.

Order 29 r. 14 of the Subordinate Courts Rules 1980, where relevant, provides for the setting aside of an order or judgment as follows:

> 14. Setting aside judgments and orders (O. 29 r. 14)
>
> Where in these rules provisions are made for the setting aside of any order or judgment, a party intending to set aside such order or judgment must make the application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

Since the first defendant has occasioned an inordinate, unexplained delay of at least not less than eight months (ie, from 1 July 2002 when first defendant wrote to the plaintiff's solicitors to 3 March 2003 when he filed his application in the sessions court) the court may refuse relief to him as an indolent litigant: (*Khor Cheng Wah, supra*, per Gopal Sri Ram JCA; and *Malayan Banking Bhd, supra*, per Suriyadi J)

Service Of Summons

It was contended for the first defendant that he has not received the notice of demand and termination, the summons and the statement of claim, and that the plaintiff has no basis to bring the action against him, relying on cl. 14(b) of the agreement ("cl. 14(b)"); and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155 SC; *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1 SC; and *Wilken Sdn Bhd v. Chua Beng Hock & Ors* [2004] 2 CLJ 164.

The plaintiff also relied on cl. 14(b) and submitted that the notice of demand and termination has been served on the first defendant, so also the summons and the application.

Upon a proper perusal of the plaintiff's affidavit in support and all the exhibits at pp. 10 to 49 of the appeal record, I am unable to find any averments in relation to the non service of the notice of demand and termination. Further, this is not one of the grounds relied on in the first defendant's application at p. 9 of the appeal record. In the circumstances, there is no necessity for me to consider this ground. Hence, the judgment of the then Supreme Court in *Orang Kaya Menteri Paduka Wan Ahmad Shukri*, *supra,* requiring the service of an antecedent demand in a guarantee there is not helpful to the first defendant.

In relation to the ground that the first defendant had not received the plaintiff's summons and statement of claim, the true position is that the summons and statement of claim had been sent by AR Registered post on 20 October 1998 to the first defendant's address, but it had been returned unclaimed. That was the address given by the first defendant in the agreement and also in his letter dated 1 July 2002 to the plaintiff. Clause 14(b) of the agreement states, *inter alia*, that any writ of summons or originating process against the first defendant shall be deemed to have been given if sent to the first defendant by prepaid registered post at the address stated in the agreement and such summons or originating process sent by post shall be conclusively deemed to have been received by the first defendant within 72 hours after the date of such posting despite any evidence to the contrary.

Clause 14(b) relied on by the first defendant herein is substantially in pan materia with cl. 17 in *Amanah Merchant Bank Bhd, supra,* where it was expressly stated that any notice "may be served by sending the same through the post to the last known address of the person to be served and shall be deemed to be served on the day following that on which it is posted.". Mohamed Dzaiddin SCJ (later CJ Malaysia) held, *inter alia*, that once the notice had been sent through the post in an envelope addressed to the defendant's last known address, it was not necessary for the appellant-bank to show that the AR card had been duly acknowledged for there to have been effective service thereof.

In the instant appeal, there can be no doubt that service of the summons by way of prepaid AR registered post addressed to the first defendant is sufficient; O. 7 r. 1(1) of the Subordinate Courts Rules 1980; and *Wilken Sdn Bhd, supra*, per Azmel Maamor J (now JCA).

I therefore find no substance in the submission presented for the first defendant.

Return Dates On The Summons

It was said for the first defendant that there were two return dates on the plaintiff's summons and in the absence of an explanation by the plaintiff, the first defendant was prejudiced, thereby rendering the judgment irregular, which should be set aside *ex debito justitiae*, referring to *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241.

The plaintiff's response is that the first defendant could not be prejudiced as the plaintiff has obtained an order for substituted service and the latest return date of 29 September 1999 had been made known to the first defendant.

In my view, the first defendant's reliance on *Tuan Haji Ahmed Abdul Rahman, supra,* is misconceived as different facts prevailed there, in that the plaintiff there had entered a judgment which was riddled with uncertainties as the interest rate was fluctuating and serious enough to render it an irregular judgment which was set aside, per Edgar Joseph Jr FCJ (as he then was) at p. 253 c-e.

Having regard to the factual background, in particular the first defendant's negotiation with the plaintiff after the judgment, I am unable to sustain the submission for the first defendant that he has been prejudiced in relation to the return date.

Conclusion

I hold that the appeal is devoid of any merits and is hereby dismissed with costs. The trial judge's decision is affirmed.